while adhering to environmental values. It was also recognized for its vehicle maintenance shop management program, for a sensitive revegetation plan, an aggressive recycling program, and for establishing a land trust to preserve the resort's scenic and natural character. Three years ago, at a series of training seminars, employees of Jackson Hole Ski Corp. chose ''Respect for the Environment'' as their highest corporate value. Jim Gill, vice president of the area, believes that economic growth and environmental protection can complement each other, because most resort guests consider themselves environmentalists who enjoy the outdoors and appreciate its natural beauty. According to Francis Pandolfi, president and CEO of Times Mirror Magazines and who presented the award,

Our judges called Jackson Hole's initiative very broad-based and far-reaching—from its downsizing of the mountain to its outreach programs, its educational accomplishments and the preservation of the area's character through its land trust. The area has done superb environmental work on virtually every front.

In addition to Jackson Hole, five other ski areas won Silver Eagle Awards for environmental excellence in the following categories:

Snowbird, UT, for water conservation and wastewater management;

Heavenly, CA, for fish and wildlife habitat protection;

Sierra-at-Tahoe, CA, for environmental education;

Winter Park, CO, for community outreach; and

Beaver Creek, CO, for area design.

Madam President, too often we only hear from critics about how ski areas destroy the wilderness. Skiing is a wonderful sport which millions of people from around the world enjoy, and the Golden Eagle Award program confirms what we all know; that it can coexist with environmental protection of the highest degree. Industry surveys show that skiers are very environmentally aware and involved, and that any perception of skiing as being antienvironmental exists only in the minds of a few. These success stories not only educate the American public about what a good job many ski areas are doing to conserve and protect the environment, but they also serve as excellent examples for other ski areas to emulate.

Congratulations to Jackson Hole Ski Corp. and to all the other winners.

FLAG DAY—JUNE 14, 1995

Mr. HATCH. Madam President, today is Flag Day. Utahns, and indeed Americans all across our great country revere the flag as a unique symbol of the United States and of the principles, ideals, and values for which our country stands.

Congress has, over the years, reflected the devotion our diverse people have for Old Glory. During the Civil War, for example, Congress awarded the Medal of Honor to Union soldiers who rescued the flag from falling into rebel hands.

In 1931, Congress declared the Star Spangled Banner to be our national anthem. In 1949, Congress established June 14 as Flag Day. Congress has established ''The Pledge of Allegiance to the Flag'' and the manner of its recitation. Congress designated John Philip Sousa's ''The Stars and Stripes Forever'' as the national march in 1987.

Congress has also established detailed rules for the design of the flag and the manner of its proper display. Congress, along with 48 States, had regulated misuse of the American flag until the Supreme Court's 1989 decision in Texas versus Johnson.

As I say, these congressional actions reflect the people's devotion to the flag; Congress did not create these feelings and deep regard for the flag among our people.

The 104th Congress will have a chance to do its part to reflect our people's devotion to Old Glory by sending to the States for ratification Senate Joint Resolution 31, a constitutional amendment giving Congress and the States power to prohibit physical desecration of the flag of the United States.

I recognize that, in good faith, some of my colleagues oppose this constitutional amendment. They love the flag no less than supporters of the amendment.

I do hope those who have opposed the amendment in the past will reconsider their position. We can protect the flag without jeopardizing freedom of expression. Freedom of expression was extremely robust when the 49 flag desecration statutes were enforceable. And there is no danger of a slippery slope here because there is no other symbol of our country like the flag. We do not salute the Constitution or the Declaration of Independence, and no one has ever suggested a ban on burning copies of these hallowed documents. Numerous other methods of protest, including marches, rallies, use of placards, posters, leaflets, and much more clearly remain available. I hope we will send this amendment to the States for ratification.

On June 6, Senator HANK BROWN, chairman of the Subcommittee on the Constitution, Federalism, and Property Rights held a hearing on the flag amendment. The subcommittee heard from 11 witnesses, including opponents of the amendment. I hope those of my colleagues inclined to vote against Senate Joint Resolution 31 will review the very fine testimony of its supporters. I ask unanimous consent that two of the statements, that of Prof. Richard Parker and former Assistant Attorney General for Legal Counsel, Charles J. Cooper, be printed in the CONGRESSIONAL RECORD following my remarks, along with my opening statement from that hearing.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF RICHARD D. PARKER, PROFESSOR OF LAW, HARVARD LAW SCHOOL

I am a civil libertarian. I believe that, in a democracy, freedom of speech must be ''robust and wide-open''. Indeed I believe it ought to be more robust and wide-open than, in some respects, it is now and than the Supreme Court has been willing, on some occasions, to grant. It's because of that belief that I urge the Congress to propose to the states a new constitutional amendment, one that would permit the people—if, through the democratic process, they so choose—to protect the flag of the United States against physical desecration.

I

Let me begin with general principles. It is, after all, at the level of fundamental value that discussion of constitutional provisions—meant ''to endure for ages to come''—should be (and has traditionally been) conducted.

My basic proposition is this: Whether freedom of speech is, in fact, robust and wide-open does not depend solely, or even primarily, on case-by-case adjudication by the courts. It depends most of all on conditions of culture. First, it depends on the willingness and capacity of people—in our democracy, that means ordinary people—to express themselves energetically and effectively in public. Second, it depends on acceptance as well as tolerance, official and unofficial, of an extremely wide range of viewpoints and modes of expression. And, third, it depends on adherence to very basic parameters that, like constitutional provisions in general, help structure democratic life the better to release its energies.

This last condition is the one that concerns us now. Everyone agrees that there must be ''procedural'' parameters of free speech—involving, for example, places and times at which certain modes of expression are permitted. Practically everyone accepts some explicitly ''substantive'' parameters of speech content as well. Indeed, despite talk of ''content-neutrality,'' the following principle of constitutional law is very clear: Government sometimes may sanction you for speaking because of the way the content of what you say affects other people.

What is less clear is the shape of this principle. There are few bright lines to define it. The Supreme Court understands the principle to rule out speech that threatens to cause imminent tangible harm: face-to-face fighting words, incitement to violation of law, shouting ''fire'' in a crowded theater. And it does not stop there. It understands the principle, also, to rule out speech that threatens certain intangible, even diffuse, harms. It has, for instance, described obscenity as pollution of the moral ''environment.'' But what about ''political'' speech critical of the government? Isn't there a bright line protecting that, at least so long as no imminent physical harm is threatened? The answer is: No. The Court has made clear, for instance, that statements criticizing official conduct of a public official may be sanctioned if they are known to be false and damage the reputation of the official. There has been no outcry against this rule. It was set forth by the Warren Court—in an opinion by Justice Brennan, the very opinion that established freedom of speech as ''robust and wide-open.''[1] It has been reaffirmed ever since. Our constitutional tradition, therefore, leaves plenty of room for debate about the necessary and proper scope of the ''substantive'' parameters of the content of free speech.

Footnotes at end of article.

In the past couple of decades, a consensus has been growing around the following proposition: Important ''substantive'' parameters of public expression, parameters that have long been taken for granted, now need to be restored. The bonds that hold us together—and so make it possible, as in a healthy family, for us to engage in ''robust'' disagreement with one another—appear to be disintegrating. On the right, on the left and in the center, it is widely agreed that certain parameters must be reestablished if free speech, in general, is to flourish.

On the right, it's believed that ''uncivil'' and ''unreasoned'' speech content needs to be checked. The Supreme Court, on occasion, has interpreted the First Amendment in light of that belief. The problem, of course, is that this tends to invite regulation of speech content that is very broad and vague, suffocating free, spontaneous participation in the marketplace of ideas. On the left, it's believed that ''hate'' speech—beyond face-to-face harassment or fighting words—that denigrates disadvantaged groups (and so pollutes the ideological ''environment'') needs to be checked. On occasion, the Court has read the First Amendment in light of that belief as well. The problem, again, is that this tends to invite broad and vague regulations suffocating freedom and spontaneity in public speech. What's more, both these prescriptions—by drawing blunt distinctions among ''types'' of speech and speakers—may, unintentionally, tend to set us apart from each other, even further disintegrating—instead of reaffirming—the bonds that unite us even in disagreement.

In the center, however, there is widespread support for restoration of a much narrower, more focused parameter: protection of the U.S. flag from physical desecration. This proposal, first of all, avoids the vices of the broader, vaguer alternatives. Its virtue, moreover, is that—by means of an extremely minimal constraint on freedom, taken for granted until recently—it affirms the most basic condition of our freedom: our bond to one another in our aspiration to national unity. It leaves it to individuals, in a thousand other ways, to criticize government and even that aspiration to unity, if they want. But it affirms that there is some commitment to others, beyond mere obedience to the formal rule of law, that must be respected. It affirms that, without some aspiration to national unity—call it patriotism if you choose—there might be no law, no constitution, no freedom.

Still, we know, objections abound. Is this ''important'' enough? Is it ''needed?'' Is it likely to be ''effective?'' Aren't there ''less drastic alternatives?'' These questions deserve answers. Yet the truth is that they practically answer themselves.

A common objection goes like this: True, the aspiration to national unity is vital but, as embodied in the flag, it is just symbolic. What place does symbolism have in the Constitution? The answer is that the framers of the Constitution put symbolism of our unity at the very beginning of the document, invoking ''We the People of the United States''. And, very near the end, they required that all officials, high and low, be ''bound by Oath or Affirmation, to support this Constitution''—a provision that, surely, is less functional than symbolic, yet whose symbolism fulfills, nonetheless, an important function. Animating the whole Constitution of 1787, after all, was the aspiration to call into being a new sense of commitment, a commitment to a broad and deep national unity-despite-difference. What was it, at the beginning, but a bold symbolic effort?

But, we hear, that's all over now. The nation exists. What need is there to revisit old ideals? Yet the framers knew that nothing, on its own, lasts forever. Every institution must be reenergized by every generation to meet new challenges. Can we deny that our generation is now challenged to renew our commitment to unity-despite-difference? The aspiration to even a minimal unity is, once more, commonly put in question. We hear that the freedom the flag symbolizes is the freedom to burn it, that our unity consists simply in a celebration of disunity. These claims go to the heart of our Constitution. It is in the Constitution that we must answer them.

We hear that flag desecrators are like a few ''naughty, nasty children'' trying to ''provoke their parents.'' The rest of the family, we hear, need only ''count to ten.''[2] What's the harm? Take the analogy seriously for a moment. How healthy is a family in which there are no limits to expressive abuse, in which everything can be trashed and will be tolerated? Desecration of mutual bonds may be rate. But so are other wrongs we believe it important to sanction. What is at stake is a principle, a minimal one. It deserves minimal respect—as a matter of principle.

Still, we are told that the aspiration to unity-despite-difference cannot be instituted by law, that it can flourish only in the ''voluntary'' feelings of the people. This argument may, of course, be made, in specific contexts, against using the narrow authority to be restored by the proposed constitutional amendment. But such an argument ought not short-circuit the process, denying the people the right to find it invalid in certain circumstances. For who can doubt that, in some circumstances, legal proscriptions do in fact influence the ''voluntary feelings of the people?'' Those who invoke these feelings should, in any event, be the last to denigrate the people's expression of them, through the processes of democracy.

Finally, we hear there are other ways to do the job. If we don't like physical desecration of the flag, we should criticize the desecrators or fly the flag ourselves. Ordinarily, I agree, ''counter-speech'' is the best response. But this situation is unique, just as the flag is unique. If it is permissible not just to heap verbal contempt on the flag, but also to burn it, rip it and smear it with excrement—if such behavior is not only permitted in practice, but protected in law by the Supreme Court—then the flag is already decaying as the symbol of our aspiration to the unity underlying freedom. The flag we fly in response is no longer the same thing. We are told, again and again, that someone can desecrate ''a'' flag but not ''the'' flag. To that, I simply say: Untrue. This is precisely the way that general symbols like general values are trashed, particular step by particular step. This is the way, imperceptibly, that commitments and ideals are lost.

To boil down the fundamental value at stake here: Recall the civil rights movement. Recall not only its invocation of national ideals, but also its evocation of nationhood. Recall the famous photograph of the Selma marchers carrying flags of the United States. The question is: Will the next Martin Luther King have available to him or her a basic means of identification with all the rest of us—an embracive appeal to the bonds that, in aspiration and potential, make us one?

II

What are the costs, if any, of proposing to amend the Constitution this way? All kinds of fears have been stirred up in opposition to the proposal. I'll comment on two kinds. First, I'll address some rather specific fears: Would the proposal ''amend''—or ''desecrate''—the First Amendment? Then, I'll turn to more generic fears: Would it upset the ''delicate balance'' of the Constitution as a whole?

The proposal would not ''amend the First Amendment.'' Rather, each amendment would be interpreted in light of the other—much as is the case with the guarantees of Freedom of Speech and Equal Protection of the Laws. When the Fourteenth Amendment was proposed, the argument could have been made that congressional power to enforce the Equal Protection Clause might be used to undermine the First Amendment. The courts have seemed able, however, to harmonize the two. The same would be true here. Courts would interpret ''desecration'' and ''flag of the United States'' in light of general values of free speech. They would simply restore one narrow democratic authority. Experience justifies this much confidence in our judicial system.

But, we're asked, is ''harmonization'' possible? If the Johnson and Eichman decisions protecting flag desecration were rooted in established strains of free speech law—as they were—how could an amendment countering those decisions coexist with the First Amendment?

First, it's important to keep in mind that free speech law has within it multiple, often competing strains. The dissenting opinions in Johnson and Eichman were also rooted in established arguments about the meaning of freedom of speech. Second, even if the general principles invoked by the five Justices in the majority are admirable in general—as I believe they are[3]—that doesn't mean that the proposed amendment would tend to undermine them, so long as it is confined, as it is intended, to mandating a unique exception for a unique symbol of nationhood. Indeed, carving out the exception in a new amendment—rather than through interpretation of the First Amendment itself—best ensures that it will be so confined. Even opponents of the new amendment agree on this point.[4] Third, it's vital to recognize that the proposed amendment is not in general tension with the free speech principle forbidding discrimination against specific ''messages'' in regulation of speech content. Those who desecrate the flag may be doing so to communicate any number of messages. They may be saying that government is doing too much—or too little—about a particular problem. In fact, they may be burning the flag to protest the behavior of non-governmental, ''patriotic'' groups and and to support efforts of the government to squash those groups. Laws enacted under the proposed amendment would have to apply to all such activity, whatever the specific ''point of view.'' One, and only one, generalized message could be regulated: ''desecration'' of the flag itself. And regulation could extend no farther than a ban on one, and only one, mode of doing it: ''physical'' desecration.[5] Finally, and perhaps most importantly, we mustn't lose sight of the fundamental purpose of the proposed amendment. That purpose is to restore democratic authority to protect the unique symbol of our aspiration to national unity, an aspiration that, I've said, nurtures—rather than undermines—freedom of speech that is ''robust and wide-open.''

One objection remains. It involves ''desecration.'' Would this word, evoking sacredness, itself ''desecrate'' the Constitution? Those who make the objection this way defeat themselves, of course. If the Constitution as a whole is ''sacred,'' as they proclaim it is, then there is no text in which a reference to ''desecration'' of the symbol of the nationhood that undergirds it could be more at home. Beyond the play on words, however, it's useful to keep in mind that this word—

like any number of others in the constitutional text—is a term of art. It has no religious connotation. The Constitution of Massachusetts, for instance, provides that the right to jury trial ''must be held sacred,''[6] and no one reads that as a theological mandate. The question for courts interpreting the proposed amendment would be: What sorts of physical treatment of the flag are so grossly contemptuous of it as to count as ''desecration?'' This is the type of question—raising issues of fact and degree, context and purpose—that they resolve year in and year out under other constitutional provisions. Thus there is nothing radical or extreme about the flag amendment—unless it is the rhetoric, igniting and fueling all kinds of fears, purveyed by some of its opponents.

III

What hides its moderation, I think, is a generic fear of any proposed constitutional amendment—or, at least, of any that is driven by wide public support. Opponents of a flag amendment evoke this fear, suggesting the ''delicate balance'' of the Constitution is in jeopardy. In the ways they make the suggestion, however, they reveal it to be misleading, even perverse.

They tell us that the Constitution is perfect. Or they talk of its fragility. The document, they imply, is too fine or too delicate to amend. But a part of its ''perfection'' must be Article V, which provides for its amendment. It has, after all, been amended many times. (The framers' generation added ten amendments in one swoop.) And, far from proving fragile, it has proved to have extraordinary tensile strength, enduring by adapting to circumstances—changing and unforeseen—just as, long ago, Chief Justice John Marshall promised it would.[7]

Yet, they tell us, any proposed constitutional language will have unintended consequences—unless we pin down, right now and forever, every jot and title of its meaning. This is sometimes an effective strategy of opposition. It was deployed, for example, against the Equal Rights Amendment, nickled and dimed to death in disputes over hypothetical details.[8] The proposed flag amendment is far narrower and, so, far less vulnerable to such opposition. But those who supported the ERA—and deplored the strategy then—should be loath to use it now. It is, in any event, deeply misguided. For if (as John Marshall taught us) the genius of our Constitution is to endure through adaptation, then any pretense to fix its precise meaning, once and for all, is futile. Few constitutional provisions—few of those in the Bill of Rights, for instance—could pass such a test. Hence, the lesson of our history is: Leave future details of application to the future; trust our judicial system; and stick, for the moment, to issues of fundamental principle.

When all is said, opponents are left with one line of argument. You ought not, they say, ''fool with'' the Constitution. You should not ''tinker'' or ''fiddle'' with it. You must not ''trivialize'' it. Here is what's fascinating: Such verbs are rarely used to describe judicial interpretations or lawyers' interpretations or academic interpretations of the Constitution. They're reserved, instead, for the process of amendment prescribed by Article V. They're reserved, especially, for amendments proposed not by ''experts'' but by large numbers of ordinary citizens and their representatives. The disdain in such language is clear. It is, I believe, a disdain for the processes of democracy and for the ordinary people who take part in them. The implication is that the Constitution—which establishes processes for its own amendment—is too elevated, too refined, to be touched by those very processes.

In the end, that's what is at stake here: Our flag symbolizes our nation. It is a nation defined not by any ethnicity, but by a political practice, the practice of popular sovereignty, of democracy. It is through democracy that our law, including constitutional law, is made. It is through democracy that our liberties are nurtured and exercised and guaranteed. It is through democracy that we are bonded to one another. Shouldn't the people be authorized, if they choose, to require a very minimal respect for that one symbol, that one value, that one aspiration?

FOOTNOTES

[1] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[2] Testimony of Charles Fried before the Committee on the Judiciary of the United States Senate, June 21, 1990.

[3] I agree with the majority, for instance, that the Freedom of Speech protects expressive conduct and that its protection should not depend on how ''reasoned'' or ''articulate'' the expression is thought to be. I also agree, as a general matter, that government may not ''prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'' I do not support the broader, vaguer proposals (described above) now being made on the right and on the left.

[4] See Frank Michelman, ''Saving Old Glory: On Constitutional Iconography,'' 42 Stanford Law Review 1337 (1990).

[5] It's entirely possible that the specific statutes declared unconstitutional under the First Amendment in Johnson and Eichman would *not* pass muster under the proposed amendment—because both may be worded too broadly. The Texas statute in *Johnson* made it a crime to ''damage'' a flag in a way known to ''seriously offend one or more persons likely to observe or discover'' it. Thus it swept beyond ''desecration'' defined by a more general standard. The United States statute in Eichman was more sharply focused. But, before the Supreme Court, the government interpreted it as extending to any and all violations of the ''physical integrity'' of the flag, again seeming to sweep beyond behavior that might count as ''desecration.''

[6] Constitution of the Commonwealth of Massachusetts, Part I, Article 15.

[7] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[8] See Jane Mansbridge, ''Why We Lost the ERA'' (1986).

TESTIMONY OF CHARLES J. COOPER

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Charles J. Cooper, and I am a partner in the law firm of Shaw, Pittman, Potts & Trowbridge. I appreciate this opportunity to testify before this distinguished Subcommittee on the proposed Flag Protection Amendment.

Almost six years have passed since the Supreme Court decided the case that the Flag Protection Amendment was specifically designed to overturn. In Texas v. Johnson the Court held that the First Amendment's guaranty extends not only to a protester's expression of anti-American sentiments (''America, the Red, White, and Blue, we spit on you.''), but also to his act of burning an American flag to dramatize his views. In so ruling, the Court in effect overturned the flag desecration statutes of 48 States, as well as the Federal Flag Desecration Statute, which prohibited knowingly and publicly ''cast[ing] contempt upon any flag of the United States'' by burning or otherwise physically mistreating it. 18 U.S.C. §700.

The reaction of the American people to the Johnson decision was swift, loud, and overwhelmingly hostile. President Bush and several Members of Congress called for swift passage and ratification of the Flag Protection Amendment, while other Members of Congress supported a statutory response to the decision—the Flag Protection Act. The purpose of the legislation was to harmonize federal law with the Johnson decision by establishing a ''neutral'' flag desecration statute— that is, one that punished any impairment of the physical integrity of the flag, whether performed in public or in private, and regardless of any message that might be intended or conveyed by the act of physical impairment.

Several witnesses, I among them, testified before the Senate Judiciary Committee that the proposed legislation, even if cast in ''neutral'' language, could not be squared with the reasoning of the Johnson decision and would therefore almost certainly be invalidated by the Supreme Court. The point was simply this: clothing the federal Flag Desecration Statute in ''neutral'' language would not disguise the undeniable fact that the central purpose of the proposed measure was to preserve the flag's unique status as ''the Nation's most revered and profound symbol, representing what this Country stands for'' (the words are Senator Biden's, the bill's chief sponsor). The governmental interest in preserving the flag's unique status as a national symbol simply cannot be divorced from expression, for only messages concerning the flag can either advance or diminish its symbolic value.

Congress enacted the Flag Protection Act of 1989 (''Act'') by overwhelming majorities in both Houses, and the Supreme Court promptly struck it down in United States v. Eichman. Noting that ''[t]he Government's interest in protecting the 'physical integrity' of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,'' the Court held that the federal statute, like the Texas statute invalidated in Johnson, ''still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact.''

The six-year period that has elapsed since the Johnson case has provided time for tempers to cool. The anger and sadness that consumed most Americans when the decision was announced has had time, if not to abate, at least to be moderated by reflection and thought. And yet it still appears that the vast majority of Americans so revere their flag that they are willing to undertake the arduous task of amending their Constitution to authorize Congress and the States to protect it from physical desecration. Congress has received resolutions calling for passage of a flag desecration amendment from the legislatures of 49 States. As a citizen, my own support for the Flag Protection Amendment has not weakened since Johnson was decided, for I remain convinced that the policies underlying the Flag Protection Amendment are sufficiently important to warrant its passage by Congress and ratification by the States.

But I have been invited to appear before this Subcommittee as a constitutional lawyer, to provide my views on the legal issues, as opposed to the policy issues, raised by the proposed amendment. I make this point because policy objections have dominated the arguments of constitutional scholars who have testified thus far before congressional committees in opposition to the Flag Protection Amendment. These policy objections—for example, that the proposed amendment would ''trivialize'' the Constitution, that flag desecration laws are popular in Communist regimes, and that the best response to flag desecration is to wave one's own flag—are important and should be considered seriously by Members of Congress, as well as by all Americans, in assessing the merits of the proposed amendment. But they are entitled to no additional weight when voiced by law professors (or Supreme Court Justices for that matter) rather than by any other citizen. I therefore will attempt to confine my testimony insofar as possible to the legal objections that have been advanced in opposition to the Flag Protection Amendment.

1. Some constitutional scholars have objected to the wording of the proposed Flag Protection Amendment, which provides simply that ''the Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.'' These constitutional scholars object particularly to the use of the word ''desecration'' because it makes clear that the amendment would authorize Congress and the States to prohibit only physical mistreatment of the flag that conveys a political protest.[1] Arguing that the Constitution should protect the flag in a ''neutral'' manner, they propose that the amendment be worded to authorize Congress ''to prohibit any physical impairment of the integrity of the flag.'' Such an amendment would ensure that any statutory restrictions would apply across the board, regardless of the purpose or circumstances of the conduct at issue.

The threshold question that must be answered by proponents of this suggestion is whether anyone really wants a ''neutral'' flag protection statue. Does anyone really want to protect the physical integrity of all American flags, regardless of the circumstances surrounding the prohibited conduct? Certainly the constitutional scholars suggesting a ''neutral'' flag protection amendment do not, for they advance the idea only as a lesser evil than the Flag Protection Amendment. Nor are supporters of the proposed Flag Protection Amendment likely to be persuaded that a ''neutral'' alternative would be preferable. The problem is that a genuinely ''neutral'' flag protection measure simply doesn't make sense.

The act of burning an American Flag is not inherently evil. Indeed, the Boy Scouts of America have long held that an American flag, ''when worn beyond repair'' should be destroyed ''in a dignified way by burning.'' Boy Scout Handbook at 422 (9th ed.) Similarly, Congress has prescribed that ''[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.'' 36 U.S.C. 176(k). Nor is the respectful disposition of an old or worn flag the only occasion on which burning a flag might be entirely proper. The old soldier whose last wish is to be cremated with a prized American flag fast against his breast would be deserving of respect and admiration, rather than condemnation.

In contrast, Gregory Lee Johnson's conduct was offensive—indeed, reprehensible—not simply because he burned an American flag, but because of the manner in which he burned it. Yet, a truly neutral flag protection statute would require us to be blind to the distinction between the conduct of Gregory Lee Johnson and his comrades and the conduct of a Boy Scout troop reverently burning an old and worn American flag. It would also reach other forms of conduct that honor, rather than desecrate, the flag. If, rather than burning an American flag, Gregory Lee Johnson and his colleagues had heaped dirt upon it in some sort of anti-American burial ritual, their conduct would undoubtedly have violated not only the Texas flag desecration statute, but a ''neutral'' flag protection statute as well. A ''neutral'' statute, however, would also have reached and punished the conduct of the unidentified patriot who gathered up Johnson's charred flag and buried it in his back yard.

Moreover, not only would a ''neutral'' flag protection statute prohibit conduct that should be praised rather than punished, it would fail to prohibit an infinite variety of public conduct that casts contempt upon the flag. Such a statute would prohibit only conduct that comprises the physical integrity of the flag. Conduct that is not physically destructive of the flag, no matter how openly offensive and disrespectful it may be, would presumably not be reached. Thus, affixing an American flag to the seat of one's pants or simulating vulgar acts with a flag would not come within such a prohibition.

Thus, a ''neutral'' flag protection statute is at once too broad, since it would prohibit conduct that no one wants to prohibit, and too narrow, since it would permit conduct that few people want to permit. The proposal therefore simply does not mesh with the public sentiment that animated the passage of 48 state flag desecration statutes and a similar measure by the federal government, that led to the prosecution of Gregory Lee Johnson under the Texas flag desecration law, that provoked the extraordinary public outcry at the Supreme Court's reversal of Johnson's conviction, and that inspired this hearing. I submit that that public sentiment is not ''neutral''; it is not indifferent to the circumstances surrounding conduct relating to the flag. If such conduct is dignified and respectful, I daresay that the American people and their elected representatives do not want to prohibit it; if such conduct is disrespectful and contemptuous of the flag, I believe that they do.

The simple truth is that no one really wants a genuinely ''neutral'' flag protection statute. Accordingly, amending the Constitution to authorize enactment of such a statute obviously makes no sense.

2. Some opponents of the Flag Protection Amendment objects to the fact that its language does not explicitly state that it overrides the First Amendment. They make two principle points.

First, they argue that the proposed amendment, as written, does nothing more than confer upon Congress and the States a legislative power that they already possess. And because the proposed amendment does not expressly override the limitations of the First Amendment, any exercise of that legislative power would be subject to the same First Amendment challenge upheld in Johnson and Eichman. In other words, the Flag Protection Amendment, as written, would not alter the result of the Supreme Court's decisions in Eichman and Johnson.[2]

The first point to be made in response to this argument is that the proposed Flag Protection Amendment contains no statement that it overrides the First Amendment because such a statement is wholly unnecessary. The First Amendment is the only constitutional provision that has been construed, or could have been construed, by the Supreme Court to prohibit Congress and the States from criminalizing the physical desecration of an American flag. The proposed amendment clearly and directly grants (many would say restores) that legislative power to Congress and the States. A couple of examples will suffice to illustrate this point. If the Supreme Court held that the Eighth Amendment forbids capital punishment in all cases, a constitutional amendment empowering Congress and the States to impose the death penalty would not also have to contain the entirely redundant statement that it overrides the Eighth Amendment in order to be effective. Similarly, a constitutional amendment granting the States power to require a moment of silence at the beginning of each school day would plainly overrule the Supreme Court's contrary Establishment Clause cases, and it would be far-fetched, to put it mildly, to suggest that the purpose and effect of such an amendment would be unclear in the absence of express language overriding the First Amendment.

Beyond this point, I must confess that I am perplexed by the claim that the claim that the States and Congress currently possess, notwithstanding Johnson and Eichman, the legislative power that the Supreme Court so decisively and permanently prevented them from exercising in Johnson and Eichman. In those cases, the Court held that neither the States nor the Congress have constitutional power to prohibit the physical desecration of the American flag. In both cases, the Court overturned convictions for conduct that plainly constituted the physical desecration of American flags. The sole purpose of the proposed Flag Protection Amendment is to overturn the Eichman and Johnson decisions and thus to return to the States and to Congress the legislative power that they thought they had to prohibit the physical desecration of the American flag.

I am even more perplexed, however, by the suggestion that passage and ratification of the Flag Protection Amendment would not alter the outcome of a future Johnson or Eichman case. Suffice it to say that there is no reasonable possibility that the Supreme Court, in some future Johnson or Eichman case, would interpret the Flag Protection Amendment as being utterly meaningless.

The second point made by these opponents of the proposed amendment is that because its language does not expressly override the First Amendment, ''it leaves entirely unclear how much of the Bill of Rights it would dump.''[3] Apparently the argument is that the omission from the Flag Protection Amendment of any statement that it overrides the First Amendment may be construed to mean that the legislative power granted by the proposed amendment is exempt from or otherwise overrides all constitutional restrictions, such as the Due Process Clause and the Eighth Amendment.[4]

Before assessing this argument on its own merits, it is important to note first the paradoxical nature of the dual conclusions that these opponents draw from the absence of language in the Flag Protection Amendment expressly overriding the First Amendment. In one breath, they argue that the omission of such language leaves the Supreme Court's interpretations in Johnson and Eichman undisturbed and, thus, renders the proposed amendment ineffective in accomplishing its acknowledged purpose. In the next breath, they argue that the omission of such language from the Flag Protection Amendment presents a serious risk that all other protections in the Bill of Rights will be ''trumped'' when confronted with an exercise of the power to prohibit the physical desecration of the flag. In other words, they argue that by failing to include language explicitly overriding the First Amendment, the authors of the Flag Protection Amendment may have unwittingly overridden every constitutional provision except the First Amendment. This line of reasoning, frankly, is specious, and nothing more need be said to dismiss the notion that the express terms of the proposed amendment must contain a reference to the First Amendment.

In any event, there is no reasonable basis for concern that the proposed Flag Protection Amendment will ''trump'' any constitutional protections other than the constitutional right to physically desecrate the American flag. To be sure, the proposed amendment's grant of legislative power to prohibit the physical desecration of the flag comprehends, for example, the power to investigate and to punish violations. But nothing in the language or history of the proposed amendment even remotely suggests that federal or state authorities would be free to enforce a flag desecration statute by randomly invading and searching homes to

Footnotes at end of article.

ferret out violations or by summarily torturing or executing violators without a trial. Nor would the proposed amendment authorize state or local governments, for example, to punish Gregory Lee Johnson, ex post facto, for his violation, to prosecute only black people for violating a flag desecration statute, or to prohibit the press from reporting on incidents of flag desecration. There are simply no plausible arguments supporting an interpretation of the proposed Flag Protection Amendment that would yield these results.

In short, the only constitutional right that will be ''trumped'' by the proposed Flag Protection Amendment is the one recognized by the Supreme Court in Johnson and Eichman—the right to physically desecrate an American flag.

3. A particularly popular argument among opponents of the Flag Protection Amendment is the concern that prohibiting physical flag desecration will compromise the sacred values reflected in the First Amendment and lead inevitably to further compromises of our Constitution's protection ''for the thought we hate.'' But if prohibiting flag desecration would place us on this sort of slippery slope, we have been on it for a long time. The sole purpose of the Flag Protection Amendment is to restore the constitutional status quo ante pre-Johnson, a time when 48 States, the Congress, and four Justices of the Supreme Court believed that legislation prohibiting flag desecration was entirely consistent with the First Amendment. And that widespread constitutional judgment was not of recent origin; it stretched back about 100 years in some States. During that long period before Johnson, when flag desecration was universally criminalized, we did not descend on this purported slippery slope into governmental suppression of unpopular speech. The constitutional calm that preceded the Johnson case would not have been interrupted, I submit, if a single vote in the majority had been cast the other way, and flag desecration statutes had been upheld. Nor will it be interrupted, in my view, if the Flag Protection Amendment is passed and ratified.

4. Finally, I should like to conclude my testimony with the point that the Supreme Court is not the final word on the content or meaning of our Constitution. The American people are. And the idea that the act of desecrating an American flag is ''speech,'' and that the people are therefore powerless to intervene through law to prevent or punish such a tragic spectacle, falls uneasily on the ears of most ordinary Americans. When the Court errs in its constitutional judgment on a matter of surpassing importance to the people, it is entirely appropriate for them to correct that error through the amendment process prescribed by Article V of the Constitution. Indeed, I believe it is their responsibility to do so.

Again, thank you for inviting me to participate in this important hearing.

FOOTNOTES

[1] See Testimony of Henry Paul Monaghan before the Senate Judiciary Committee (June 21, 1990); testimony of Cass R. Sunstein before the Senate Judiciary Committee (June 21, 1990).

[2] Testimony of Walter Dellinger before the Senate Judiciary Committee at 2 (June 21, 1990) (hereinafter ''Dellinger Testimony'').

[3] Id.

[4] See id. at 3, n. 2.

STATEMENT OF SENATOR ORRIN HATCH

The American people revere the flag as a unique symbol of our country. It is the symbol that unites a very diverse people in a way nothing else can. Despite our differences of politics, philosophy, religion, race, ethnic background, socio-economic status, or geographic origin, the flag is an incomparable common bond among us.

Moreover, Justice John Paul Stevens, dissenting in Texas v. Johnson, aptly stated, ''A country's flag is a symbol of more than 'nationhood and national unity.' It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas . . .'' [491 U.S. at 436, Stevens, J. dissenting] The flag itself represents no political party or political ideology.

I wish we did not have to resort to a constitutional amendment. I believe the Supreme Court was wrong in Texas v. Johnson. But the Supreme Court has given us no choice: if we believe the flag is important enough to protect from physical desecration, an amendment is necessary.

Let me set the record straight about the origin of this bipartisan movement. A grassroots coalition, the Citizens Flag Alliance, has been working for some time in support of a constitutional amendment regarding flag desecration. The Citizens Flag Alliance, led by the American Legion, consists of over 100 organizations, ranging from the Knights of Columbus; Grand Lodge, Fraternal Order of Police; and the National Grange to the Congressional Medal of Honor Society of the USA and the African-American Women's Clergy Association. Forty-nine state legislatures have called for a constitutional amendment on flag desecration.

The Citizens Flag Alliance approached Senator Heflin and me last year, well before the November elections, and asked us to lead a bipartisan effort in the Senate. They told us they had reasonable hopes that President Clinton would support this amendment. We were pleased to introduce this resolution here. But, before we were asked to do so by the Citizens Flag Alliance, we had no plans to reintroduce this amendment.

This is an effort originating entirely among the American people, over 75 percent of whom both favor protecting the flag and sensibly believe that freedom of speech is not jeopardized by so doing.

There is more wisdom, judgment, and understanding on this matter in the hearts and minds of the American people than one will find on most editorial boards, law faculties, and, regrettably, in the Clinton Administration.

I believe the opponents of the amendment, including President Clinton, have, in good faith, posed a false choice to the American people. In effect, they say that if we wish to protect the flag from physical desecration, we have to trample on the First Amendment. If we want to safeguard the First Amendment, they say, we have to let desecrators trample on the flag.

In my view, this amendment, granting Congress and states power to prohibit physical desecration of the flag, does not amend the First Amendment or infringe upon freedom of speech. I believe the flag amendment overturns two Supreme Court decisions which have misconstrued the First Amendment.

The First Amendment's guarantee of freedom of speech has never been deemed absolute. Libel is not protected under the First Amendment. Obscenity is not protected under the First Amendment. A person cannot blare out his or her political views at two o'clock in the morning in a residential neighborhood and claim First Amendment protection. Fighting words which provoke violence or breaches of the peace are not protected under the First Amendment. I might add that legislative bodies are able to regulate conduct which people might seek to use as part of a political message.

Protecting the flag from physical desecration does not interfere with the numerous ways of conveying an idea whatsoever—through speech, use of placards, signs, bullhorns, leaflets, handbills, newspapers, and more. A protestor can burn or mutilate other symbols of our country or government, or even effigies of political figures. This amendment authorizes legislative bodies to prevent disrespectful conduct with regard to one object, and one object only, our flag. We can withdraw this one unique object from physical desecration and our freedom of speech will remain intact.

The parade of horribles some opponents conjure up is a diversion.

Indeed, for many years before the 1989 Texas v. Johnson decision invalidating flag desecration statutes, 48 states and the federal government prohibited flag desecration. Was freedom of speech impaired in this country all that time? To ask that question is to answer it—of course not. The First Amendment seemed to have survived these 49 statutes remarkably well.

Many academics have appeared before the Committee to tell us the Johnson decision was correctly decided and that it is just a natural development of the Supreme Court's previous First Amendment jurisprudence.

Yet, distinguished jurists regarded as great First Amendment champions have agreed that flag desecration does not fall within the ambit of the First Amendment. Chief Justice Earl Warren wrote, ''I believe that the States and the Federal government do have the power to protect the flag from acts of desecration and disgrace . . .'' [*Street* v. *New York*, 394 U.S. 576, 605 (Warren, C.J., dissenting)]. Justice Hugo Black—generally regarded as a First Amendment absolutist—stated, ''It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense.'' [Id. at 610 (Black, J. dissenting)]. Justice Abe Fortas wrote: ''[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public . . .'' [Id. at 615 (Fortas, J., dissenting)].

As Justice Stevens said in his Johnson dissent: ''Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.'' [496 U.S. at 436, Stevens, J., dissenting].

Even if, on the other hand, one agreed that the Johnson and 1990 U.S. v. Eichman cases were correctly decided under prior precedents, one could still support this amendment—if one views protection of the flag from physical desecration as an important enough value. I am sorry that President Clinton could not see his way clear to supporting protection of the flag against physical desecration, apparently deferring to the determinations made by his lawyers within the narrow confines of a legal memorandum or brief. This is terribly disappointing.

And there is no slippery slope here. The amendment relates only to the flag. The uniqueness of the flag renders the amendment no precedent for any other amendment or legislation. Most Americans understand this. Moreover, neither the amendment, nor any legislation it authorizes, compels any conduct or any profession of respect for any idea or symbol, nor prescribes what is orthodox in any matter of opinion.

Johnson was a 5–4 decision of the Supreme Court. Had the Court gone 5–4 the other way, and upheld flag desecration statutes, would there have been an uproar by editorial writers, law professors, and members of Congress to repeal these flag desecration statutes? I think not. In effect, one vote on the Supreme Court compels us to go the amendment

route, we have no choice—if we think the flag is important enough to protect.

Our acquiescence in the Supreme Court's misguided 5–4 decisions itself devalues the flag. I hope Congress will not stand idly by and tacitly accept the Court's wrongheaded notion that the flag is of no more value than a common object. As Justice Stevens wisely noted in his Johnson dissent: ''sanctioning the public desecration of the flag will tarnish its value . . . That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available alternative mode of expression including uttering words critical of the flag . . . be employed.'' [436 U.S. at 437]

I urge support for the amendment.

RACE FOR THE CURE—BREAST CANCER AWARENESS

Ms. MIKULSKI. Madam President, I rise today to join my colleagues in enthusiastically supporting the efforts of our Vice President and Mrs. Gore in bringing breast cancer awareness to the attention of our Nation's women. their participation in the Race for the Cure demonstrates their on-going commitment and dedication to finding a cure for breast cancer and for early detection.

I am proud to have been an advocate for breast cancer research and early detection. When we passed the breast and cervical cancer amendments of 1993, it showed that we can build a preventive health care system using the community-level, public/private partnerships which are critical to success. This legislation saved women's lives.

But our job is not over. There are many States that have no screening program for breast cancer and many other States are just getting started. Screenings are absolutely necessary if we are to prevent this dreaded health risk for America's women.

All women in America are at risk. In fact, 50,000 mothers, daughters, relatives, and friends will die from breast cancer alone. but the women most at risk are also those who are our most defenseless—older women, women of color, and women of limited income.

Over the past few years, we have made significant strides in breast cancer research—focused through the National Institutes of Health's Office of Women's Research. We know what it takes to save many of these lives.

It takes regular screening for women over 40 using mammograms and self-exams. All women need to hear this message. All women should think of getting a mammogram as once a year for a lifetime. For the fortunate majority of America's women, following through on that message is not too much to ask.

That is why I take pride in joining my colleagues today in urging participation in the Race for the Cure to be held this Saturday, June 16. Events like this get the message out. The message of ''breast cancer is preventable'' and ''Once a Year for a Lifetime'' in getting that mammogram.

I welcome the day when no woman turns away from the decision to have a mammogram for lack of funds, access to services, or lack of awareness. This is the noble cause I am dedicated to. America's women deserve no less. Join Race for the Cure.

RACE FOR THE CURE

Mr. DASCHLE. Madam President, I would like to take a few moments to underscore the comments many of my colleagues made earlier today in support of the upcoming Race for the Cure, which will be held this Saturday in Washington. This weekend's race marks the 6th year that Washingtonians have participated in this important event. it is a time when policymakers, civil servants, media representatives, and other put their ideological differences aside and show their solidarity in support of the effort to find a cure for breast cancer.

In the past, the Race for the Cure has helped raise critical funding for medical research and for mammograms. Much of this money remains in the local area to support research institutions and provide mammograms for women who could not otherwise afford them. The Race for the Cure has also done an exceptional job of raising the public's awareness about breast cancer, and of alerting women to the importance of early detection measures.

As in the past, many of Saturday's race participants will be breast cancer survivors. Many more will be the spouses, children, siblings, and friends of both breast cancer survivors and, I am sad to say, the many women who have not survived their battle with this disease. It is for all these individuals that we race. And it is for them that we continue our efforts to support research and public awareness in the hope that one day all women who face this disease will be survivors.

Although we have made significant strides in combating breast cancer, we are far from the finish line. Medical research into the causes, cure, and prevention of breast cancer is critical to this effort. Public awareness and prevention efforts are also critical components of our battle against breast cancer. Today doctors strongly recommend monthly self-examinations to check for the early warning signs of breast cancer. Sometimes these early warning signs are not early enough, however, and that is why it is so important for women at risk of breast cancer to have mammograms. I am hopeful that one day we will be able to detect all breast cancers at an early stage.

I am even more hopeful, however, that we will someday have a cure for this disease. Over 70 percent of all women who have breast cancer do not exhibit any of the known risk factors. This year 182,000 women will be diagnosed with breast cancer, and 46,000 women will die from this terrible disease. Whether the answer to this disease is around the corner, or it takes years to discover, we cannot give up the fight. We must find a cure.

Sometimes the most effective movements are born of tragedy, and the Race for the Cure is one of those movements. this race is a tribute to all women who have not survived their battle with breast cancer. It is in their memory that we continue our efforts to increase support for medical research and raise public awareness about this issue.

This race is also a tribute to all those women who are surviving their battle with breast cancer. It is in their honor that we stand with them, walk with them, and run with them. It is in humble respect that we race with them—to find a cure for breast cancer.

VARIOUS ISSUES REGARDING THE PEOPLE'S REPUBLIC OF CHINA

Mr. THOMAS. Madam President, as the chairman of the Subcommittee on East Asian and Pacific Affairs, I would like to speak this morning on two issues concerning the People's Republic of China; specifically, Hong Kong and our embassy in Beijing.

First, Hong Kong Governor Chris Patten contacted me last Friday to inform me that his government and the government of the People's Republic of China had finally reached an agreement on establishing the Court of Final Appeal [CFA]. He was kind enough to send me a copy of the agreement, as well as a copy of his statement to the Hong Kong Legislative Council.

As my colleagues know, the establishment of the CFA has been one of the major sticking points in the negotiations over the transition of Hong Kong from British to Chinese sovereignty in 1997. Hong Kong presently operates under a British legal system based on statute and common law, and the judiciary is a separate, independent branch of government. These legal traditions provide substantial and effective protections against arbitrary arrest or detention, and ensure the right to a fair and public trial. Aside from the legal protections individuals enjoy under this system, Hong Kong's transparent and predictable legal system and regulatory scheme has been a major draw to businesses. They know ahead of time what statutes govern their actions, and that their contracts will be enforced. The continuance of these laws after 1997 will be a key factor in the territory's ability to maintain its promised high degree of local autonomy and its attraction to business.

Final trial court decisions in Hong Kong are now appealable to the Supreme Court, and then to the Privy Council in London. There is a well-founded concern that, upon retrocession, the protections offered by the present legal and appellate systems might disappear to be replaced by a more ''indigenous'' system where the courts are instruments of the Party, contracts are honored only as long as they are useful, and final decisions are handed down from Beijing according to the whims of the leadership.

In an attempt to ally these fears, in the Joint Declaration and subsequent